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FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

JUN 14 1994

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matters of)
)
The Constitutionality of)
Section 73.658(k) of the Commission's)
Rules ("Prime Time Access Rule"))
)
and)
)
Amendment of Section 73.658(k))
of the Commission's Rules to)
Delete the "Off-Network")
Program Restriction)

MMB File No. 900418A
MMB File No. 920117A
MMB File No. 870622A

To: The Commission

COMMENTS OF BONNEVILLE INTERNATIONAL CORPORATION

Bonneville International Corporation ("Bonneville"), by its attorneys, hereby submits its comments on the above-referenced Petition for Declaratory Ruling filed by First Media Corporation, the Application for Review filed by Channel 41, Inc., and the Petition for Rule Making filed by Hubbard Broadcasting, Inc. in the above-captioned proceedings (collectively "Petitions").^{1/} In general, the Petitions challenge the constitutionality and continued validity of the Prime Time Access Rule ("PTAR") and its "off-network" clause and request that the Commission either delete the PTAR in its entirety or eliminate its "off-network" component.

Bonneville is a long-time broadcaster and has participated in numerous Commission proceedings over the years which have sought to improve the quality of

^{1/} See FCC Public Notice, *Petitions, Applications and Related Pleadings Regarding the Prime Time Access Rule, Section 73.658(k) of the Commission's Rules*, released April 12, 1994, seeking comments on three separate requests challenging the Commission's Prime Time Access Rule.

television broadcasting.^{2/} Bonneville believes that the elimination of the PTAR in its entirety or, at a minimum, the off-network clause, would serve the public interest and improve the quality and selection of programming available to the public during prime time. Bonneville maintains that the wholesale transformation of the video marketplace that has occurred since the PTAR was adopted has undercut any claimed justification for the rule. The rule is anti-competitive and unfairly restricts the programming judgments of broadcast licensees.

I. BACKGROUND

The PTAR provides that network affiliated television stations in the top 50 television markets may only devote three hours of the four hours of prime time programming to programs that originated from a national television network.^{3/} In 1970, when the PTAR was adopted, the three national networks were viewed as having control over access to the prime time evening television schedule in addition to being the prime source for television programming. The theory behind implementing the PTAR was to curb the dominance of the networks in programming and multiply competitive sources of television programming.^{4/} Access to broadcast stations during prime time was deemed essential for the syndication industry (composed of independent producers capable of producing prime time quality programs) to have an adequate base of television stations to use its product.^{5/}

^{2/} The following stations are part of the Bonneville Group: KIRO-TV, Seattle, Washington; and KSL-TV, Salt Lake City, Utah.

^{3/} 47 C.F.R. § 73.658(k).

^{4/} *Amendment of Part 73 of the Commission's Rules and Regulations with Respect to Competition and Responsibility in Network Television Broadcasting, Report and Order*, 23 F.C.C. 2d 382 (1970) ("Network Television Broadcasting").

^{5/} *Network Television Broadcasting*, 23 F.C.C. 2d at 386.

When the PTAR was adopted in 1970, then Chairmen Dean Burch in a Dissenting Statement pointed out that no record had been developed on the off-network clause in the PTAR and that the Commission had "no data whatsoever as to the economic impact of this particular provision, both on the efficacy of the rule and upon the contractual arrangements of the stations."^{6/} Nevertheless, in 1975, the Commission reaffirmed the PTAR in *Prime Time II* finding that the rule "seeks to encourage alternative sources of programs not passing through the three network funnel so that licensees would have more than a nominal choice of material."^{7/} The Commission admitted, however, that the rule had not been fully tested and that an evaluation of the long term potential could not be made at that point.^{8/}

It cannot be disputed that today's video marketplace is a far cry from the marketplace that existed in 1970 and 1975. Given today's abundant programming resources and outlets for these programs, the theories behind the PTAR are no longer valid.^{9/} Moreover, the PTAR is currently having a detrimental anti-competitive effect on those network affiliate stations that must comply with its arbitrary restrictions.

^{6/} *Id.* at 415.

^{7/} *Consideration of the Operation of, and Possible Changes in, the Prime Time Access Rule, § 73.658(k) of the Commission's Rules, Second Report and Order*, 50 F.C.C. 2d 829, 835 (1975) ("*Prime Time II*").

^{8/} *Id.* at 837.

^{9/} See *OPP Working Paper (26), Broadcast Television in a Multichannel Marketplace*, 6 FCC Rcd. 3996 (1991) ("*OPP Working Paper*"); see also, *New Television Networks: Entry, Jurisdiction, Ownership and Regulation*, 510 (1980) (finding that the PTAR "does nothing to increase the number of outlets or viewing options available to the public and thus could not be expected to affect competition or diversity in a manner that would increase viewer satisfaction.").

The Commission should take this opportunity to do away with a rule whose purpose no longer exists.

II. THE PTAR UNFAIRLY DENIES NETWORK AFFILIATES THE ABILITY TO COMPETE IN TODAY'S COMPETITIVE PROGRAMMING MARKETPLACE

The PTAR and its off-network component diminish the ability of affected affiliates of CBS, ABC and NBC to compete for viewers during the access period by restricting their choices in programming. Bonneville has been directly affected by the anti-competitive impact of the PTAR and its off-network clause. Specifically, Bonneville's station KIRO-TV, a CBS affiliate, purchased the syndication rights to air "The Cosby Show" from October of 1988 until October of 1993. Because of the PTAR off-network clause, however, KIRO was placed at a competitive disadvantage and could not air the program during prime time between 7:00 and 8:00 p.m. KIRO decided to air "The Cosby Show" at 6:30 p.m. when the audience was much smaller. However, an independent station in the area was able to air any off-network re-run of its choosing during the 7:00 to 8:00 p.m. time period as it was not subject to the PTAR restriction.

Similarly, in April of 1992, KIRO-TV requested a waiver of the Commission's PTAR rule so that it could air the NCAA Basketball Championship game from 5:30 to 8:00 p.m., followed by a half hour CBS program "Evening Shade," (that had been presented on CBS prior to the game on the East coast) followed by "The Cosby Show" locally. KIRO-TV intended to complete its prime time schedule with two off-network hour programs that it owned so as to be competitive with the programming airing on the other local stations. KIRO-TV was unable, however, to

obtain a waiver of the PTAR from the Commission in order to broadcast this program schedule.

On several other occasions KIRO-TV has been unable to program its station competitively where sports events originating from the East coast have been aired live at Pacific coast time. The time zone differential has left "holes" in the programming schedule that KIRO-TV has been precluded from filling with off-network programming because of the PTAR. Bonneville's other station KSL-TV, also a CBS affiliate, has experienced similar problems with respect to the impact of the PTAR on its broadcast of the World Series baseball games and the placement of syndicated programming such as "The Cosby Show" during prime time. Yet, the independent stations and Fox affiliates operating in the markets where Bonneville's stations are located do not have any such restrictions on their programming selections.

The off-network ban thus restricts the programming abilities of CBS, ABC and NBC network affiliates by making unavailable to them, during prime viewing hours, the shows most popular with viewers. These shows are available, however, on an unlimited basis to their competitors. There is no room in today's video marketplace for anti-competitive regulations such as the PTAR which restrict the programming content of selective broadcasting outlets. Thus, the PTAR and its off-network rule must be eliminated in order to provide for a freely competitive marketplace.

III. THE BROADCAST MARKETPLACE HAS DRASTICALLY
CHANGED SINCE THE IMPLEMENTATION OF THE PTAR AND
THE OFF-NETWORK RULE

When adopting the PTAR and the off-network rule, the Commission found that of the top 50 markets, only 14 had at least one independent VHF

television station. ^{10/} Today, this number has more than doubled with 29 independent VHF stations in the top 50 markets. ^{11/} Moreover, the top 50 markets have the ability of receiving 266 independent stations. ^{12/} Currently, there are a total of 1,519 licensed television stations in the United States, almost three times the amount available in 1970. ^{13/} Cable television, which was virtually non-existent in 1970 (2,490 operating systems) is now a dominant part of the television marketplace (11,217 operating systems in 1994). ^{14/} Many other alternative media outlets have emerged since 1970 including MMDS, direct broadcast satellite, and video dial tone. The vast array of video transmission capabilities make it abundantly clear that many outlets now exist for programming.

A fundamental change in the video marketplace is the addition of the Fox Broadcasting Company and its various affiliated stations as well as the development of new networks such as those by Paramount and Warner Brothers. In 1970, the Fox Network did not exist. In 1994, not only has the network of Fox stations and affiliates increased to 51 stations in 48 of the top 50 markets, ^{15/} but recently a number of CBS and ABC network affiliate stations have announced they are leaving their existing networks to join Fox - which is not covered by the PTAR.

^{10/} *Network Television Broadcasting*, 23 F.C.C. 2d at 385.

^{11/} *See Broadcasting and Cable Yearbook*, 1994.

^{12/} *Id.*

^{13/} FCC Public Notice, *Broadcast Station Totals as of May 31, 1994*, released June 7, 1994. According to the Commission in *Network Television Broadcasting*, there were 621 licensed television stations as of December 31, 1969. 23 F.C.C. 2d at 385.

^{14/} *Television and Cable Factbook* 1994 at I-68.

^{15/} *See Broadcasting and Cable Yearbook*, 1994.

These changes in affiliation and others that are likely to occur,^{16/} underscore the absurdity of continuing to impose the PTAR restrictions on CBS, ABC and NBC affiliated stations. The PTAR regulatory scheme simply is at odds with the realities of today's marketplace.

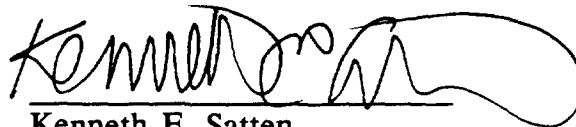
CONCLUSION

Today's video marketplace is drastically different from the market place of 1970. However, the PTAR and its off-network component continue to place unnecessary, arbitrary and anti-competitive restrictions on CBS, ABC and NBC affiliated stations. In view of the foregoing, Bonneville submits that the Commission should eliminate the rule.

Respectfully submitted,

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^{16/} *Fox Deal May Cause Other Shifts, Experts Say*, Wash. Post, May 26, 1994, at B13.